



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE HONORABLE BOARD OF PATENT APPEALS AND  
INTERFERENCES

In re the Application of

Jacques HABATJOU

Application No.: 10/830,121

Examiner: J. BOECKMANN

Filed: April 23, 2004

Docket No.: 119426

For: A DEVICE FOR SPRAYING A SUBSTANCE, INCLUDING A  
REMOVABLE RESERVOIR

REPLY BRIEF

Appeal from Group 3752  
OLIFF & BERRIDGE, PLC  
P.O. Box 320850  
Alexandria, Virginia 22320-4850  
Telephone: (703) 836-6400  
Fax: (703) 836-2787  
Email: email@oliff.com  
Attorneys for Appellants

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**II.        TABLE OF AUTHORITIES**

NONE.

### **III. GROUNDS OF REJECTION TO BE REVIEWED** **(CORRECTED)**

Section VII of the Appeal Brief contained typographical errors, and should be replaced by the following. Item 1 should not have included canceled claim 2. Item 5 should not have included canceled claims 23 and 24. Appellant apologizes to the Board and the Examiner for the typographical errors in the original Brief.

The following grounds of rejection are presented for review:

1) Claims 1, 5-7, 9-17, 43 and 44 are rejected as having been obvious under 35 U.S.C. §103(a) over DE 3517122 to Schillig in view of U.S. Patent No. 4,272,768 to Rookard Jr. (hereinafter "Rookard");

2) Claims 3 and 4 are rejected as having been obvious under 35 U.S.C. §103(a) over Schillig in view of Rookard, and further in view of U.S. Patent No. 4,306,685 to Coffee;

3) Claim 20 is rejected as having been obvious under 35 U.S.C. §103(a) over Schillig in view of U.S. Patent No. 1,603,612 to Krautzberger;

4) Claim 20 is rejected as having been obvious under 35 U.S.C. §103(a) over Krautzberger in view of Schillig; and

5) Claims 21, 22, 25-34, 36-38, 40-42, 45 and 46 are rejected as having been obvious under 35 U.S.C. §103(a) over Krautzberger in view of U.S. Patent Application Publication No. 2003/0108487 to Bara.

#### **IV. STATEMENT OF ADDITIONAL FACTS**

99. Appellant pointed out that one of ordinary skill in the art would not have reasonably looked to Rookard to modify Schillig. (Appeal Brief ("AB"), at page 29, lines 12-14).
100. Appellant pointed out that the Examiner fails to establish that sloshing is a problem in Schillig or in cosmetic sprayers. (AB, at page 30, lines 5-8).
101. Rookard addresses the field of marine survival and problems with sailors wearing canteens and survival devices. (Rookard, at col. 1, lines 35-55).
102. Appellant asserted that the sloshing caused by wearing a canteen partially filled with drinkable liquids, as disclosed in Rookard, does not obviously correspond with any problems suggested by Schillig or associated with a handheld paint spray gun as taught by Schillig or even a cosmetic sprayer. (AB, at page 30, lines 13-17).
103. The Examiner asserted that fluid present in any reservoir will inherently slosh around. (The Examiner's Answer ("EA"), at page 15, lines 4-5). Appellant disagrees.
104. The Examiner's Answer changed the analysis from that of the Final Rejection to now assert that Rookard shows a reservoir with compartments being arranged to feed the spray mechanism. (EA, at

page 5, lines 15-19; Final Rejection, at page 2, lines 15 and 16).

Applicant disagrees.

105. The Examiner implies that sloshing is a problem in Schillig. (EA, at page 6, lines 1-3). Appellant disagrees.

106. The American Heritage® Dictionary defines the transitive verb of slosh as "1. To spill or splash (a liquid) copiously or clumsily. 2. To agitate in a liquid." ("slosh," The American Heritage® Dictionary of the English Language, Fourth Edition, Copyright © 2002, 2000 by Houghton Mifflin Company, Published by Houghton Mifflin Company).

107. Appellant's specification, at paragraph [0014], discloses that an advantage of the partition recited in claim 1 is that it ensures a continuous substance feed when applying makeup, even in the event of changing an inclination of the reservoir holding the makeup. (Appellant's specification, at paragraph [0014]).

108. The marine survival canteen of Rookard addresses the problem that sailors wear canteens during their normal day-to-day duties. In these active situations, the forces applied to a partially full canteen cause the canteen to have erratic motion, which is annoying or irritating to the wearer. (Rookard, at col. 1, lines 30-34 and 53-55; col. 2, lines 58-62).

109. Appellant pointed out that the Examiner fails to establish that it would have been obvious to place baffles 6 in the position over dispensing pin 4 or support 17 (referred to in the Appeal Brief as "spiked tube 4" and "member 17"). (AB, at page 27, lines 1-2).
110. Appellant pointed out that the Examiner has not established that one of ordinary skill in the art would have inserted baffles 6 of Rookard into the reservoir of Schillig at a position corresponding to "the substance outlet passage opening out at one end thereof on either side of said first partition," as recited in claim 1. (AB, at page 27, lines 6-11).
111. Appellant pointed out that, for the Examiner to establish that this combination reasonably corresponds to this recited feature, baffles 6 of Rookard would have to be located over support 17 of Schillig, more specifically, dispensing pin 4 of Schillig. (See AB, at page 27, lines 10-13.)
112. Appellant pointed out that the Examiner has not, and cannot, establish that it would have been obvious to place baffles 6 of Rookard in canister 3 of Schillig in a position over support 17 of Schillig, or more specifically, dispensing pin 4 of Schillig. (See AB, at page 27, lines 14-16).
113. The Examiner asserts that baffles 6 of Rookard are located in the center of modified reservoir 3 of Schillig and positioned with the substance

outlet passage opening out at one end thereof on either side of the first partition. (EA, at page 14).

114. The Examiner asserts that it is within the purview of one of ordinary skill in the art to modify the baffles of Rookard to 1) have a cutout for support 17 of Schillig or 2) be disposed over support 17 of Schillig. (EA, at page 14).

115. Rookard has baffles 6 with openings 7 in a specific configuration to create separated volumes to prevent uncontrolled sloshing and to allow liquid to be drained through the mouth 4 of a canteen at a rate suitable for drinking. (See Rookard, at col. 2, lines 36-41 and at col. 4, lines 8-11).

116. In Rookard, mouth 4 is located at the center of the top of the canteen, and baffles 6 are located in the center of the canteen bisecting mouth 4. (Rookard, at Figs. 1 and 3).

117. In Rookard, baffles 6 are disposed touching the edge of the canteen until they reach mouth 4. (Rookard, at Figs. 1 and 3).

118. Schillig depicts reservoir 3 without any baffle-like structures. (Schillig, at Fig. 2).

119. Fig. 2 of Schillig depicts dispensing pin 4 being enclosed within support 17, which obstructs access to the dispensing pin 4, and being located near the side edge of reservoir 3. (Schillig at Fig. 2).



120. Rookard is silent about shaping baffles around objects similar to support 17 of Schillig.
121. The Examiner's Answer newly asserts that both Rookard and Schillig are in the field of liquid dispensing, and are thus in the same field of endeavor. (EA, at page 15, lines 2-4).
122. Toilet bowls dispense liquids to pipes, and car engines dispense liquids to cooling systems.
123. Claim 1 recites, among other features, "A spray device comprising: ... a reservoir containing a substance ... wherein the substance comprises a cosmetic or a care product."
124. The Examiner's Answer asserts that "a cosmetic or a care product" is an intended use, that little or no patentable weight is given to this feature, and the material does not constitute a structural difference between the prior art and Appellant's invention. (EA, at page 15, lines 14-16).
125. Appellant disagrees.

**V. ARGUMENT**

**A. Claims 1, 5-7, 9-17, 43 and 44 Would Not Have Been Obvious Over Schillig in View of Rookard**

The following remarks are directed to four new points of argument relating to claim 1 raised in the Examiner's Answer dated July 29, 2009. The other points addressed in the Examiner's Answer have already been addressed in Appellant's Appeal Brief. The Examiner's four new points regarding independent claim 1 are:

1) Sloshing is inherent in all reservoirs, and therefore one of ordinary skill in the art would have modified reservoir 3 of Schillig with baffles 6 of Rookard. (Fact 103).

2) One of ordinary skill in the art would have made a cutout in baffles 6 for support 17 of Schillig or would have located baffles 6 of Rookard above support 17 of Schillig. (Fact 114).

3) Both Rookard and Schillig are in the field of liquid dispensing, and thus are analogous art. (Fact 121).

4) A cosmetic or a care product is an intended use, and little or no patentable weight is given to this feature. (Fact 124).

Appellant submits that these points are either factually incorrect or are based on clear error of law. Therefore, Appellant requests this Honorable Board to reverse the final rejection in view of the below remarks and the facts and arguments presented in Appellant's Appeal Brief.

**1. Sloshing is Not an Inherent Problem in Schillig Because the Spray Gun of Schillig is Not Agitated in Normal Use**

In Appellant's Appeal Brief, Appellant pointed out that one of ordinary skill in the art would not have reasonably looked to Rookard's canteen to modify Schillig's paint sprayer to achieve the claimed invention. (Fact 99). Specifically, Appellant pointed out that the Examiner fails to establish that sloshing is a problem in Schillig or in cosmetic sprayers. (Fact 100). The adverse effects of sloshing caused by wearing a canteen partially filled with drinkable liquids in the field of marine survival, as disclosed in Rookard, does not obviously correspond with any problems suggested by Schillig, associated with a handheld paint spray gun as taught by Schillig, or even more pertinently, associated with a cosmetic sprayer. (Facts 101, 102 and 108).

The Examiner has implied that sloshing is a problem in Schillig. (Fact 105). The Examiner's Answer now asserts, at page 15, lines 4-5, that fluid present in any reservoir will inherently slosh around. (Fact 103). This assertion is overreaching. (Fact 103). The fact that sloshing is a result in a canteen worn by a sailor or marine in a way that causes agitation is not sufficient to show that all reservoirs in all circumstances experience sloshing, or that sloshing would be a problem in all reservoirs, including Schillig's reservoir or a cosmetic sprayer.

The American Heritage® Dictionary defines "slosh" as to agitate in a liquid. (Fact 106). From this, one of ordinary skill in the art would have

understood that sloshing in a reservoir requires at least two features, namely, liquid and agitation (as well as space and volume sufficient to create sloshing). For example, a motionless reservoir filled with a liquid, e.g., a drinking water reservoir, is not agitated and does not have the problem of sloshing. Likewise, the spray gun of Schillig or a cosmetic sprayer may be used when still or in motion. For example, a user of the spray gun may move the spray gun with controlled movements from side to side to evenly paint a car door. However, the motion in this situation, and under other reasonable application conditions and situations, does not rise to the level of agitation to have sloshing occur or be a problem. Furthermore, there is no suggestion in Schillig that the paint sprayer should be worn. In Rookard, however, the only reason to avoid sloshing is that it is annoying or irritating when the canteen is worn. (Fact 108).

Appellant's specification discloses that an advantage of the partition recited in claim 1 is that it ensures a continuous substance feed when applying makeup, even in the event of changing an inclination of the reservoir holding the makeup. (Fact 107). Changing the inclination of a reservoir is not enough motion to cause the makeup in the reservoir to have agitation or to create any problem associated with sloshing. Therefore, the cosmetic reservoir in ordinary use is not agitated, and therefore does not have sloshing liquid or a sloshing problem. Nor does the art suggest that a cosmetic applicator should be worn.

The motion of these sprayers can be contrasted with the agitation of the marine-survival canteen during a sailor's normal day-to-day duties. In these active situations, the forces applied to the canteen cause the canteen to have erratic motion. (Fact 108). Therefore, the liquid in these canteens can be considered to reasonably be agitated and, as disclosed in Rookard, to cause a problem to the person wearing them.

As shown above, the differing uses, configurations and motion conditions of reservoirs result in different outcomes regarding sloshing. Nothing in the art suggests that reservoir 3 of the spray gun of Schillig would have the required agitation for sloshing or would be adversely affected by any level of sloshing that might occur. Therefore, the Examiner's assertion regarding sloshing in all reservoirs is overreaching. As shown above, it is factually incorrect and not reasonably associated with the applied art in such a manner as to provide one of ordinary skill in the art with any reason to make the applied modification of the art.

In fact, the Examiner's Answer changed the analysis from that of the Final Rejection to now assert that Rookard shows a reservoir with compartments being arranged to feed the spray mechanism, which is also factually incorrect, apparently to bolster the argument that Schillig and Rookard are analogous art. (Fact 104). Rookard is about canteens, and does not even address spray mechanisms. Thus, because Rookard addresses the problem of

sloshing in canteens being worn and does not address spray mechanisms, one of ordinary skill in the art of paint sprayers or cosmetic applicators would not have looked to Rookard to modify paint sprayers or cosmetic applicators.

For at least the reasons listed above and in Appellant's Appeal Brief, the Examiner has not shown and cannot show that one of ordinary skill in the art would have reasonably looked to Rookard to modify Schillig.

**2.     **Modification of Baffles is  
Based on Impermissible Hindsight****

In Appellant's Appeal Brief, Appellant pointed out that the Examiner fails to establish that it would have been obvious to place baffles 6 in a position over dispensing pin 4 or support 17. (Fact 109). Appellant pointed out that the Examiner has not established that one of ordinary skill in the art would have inserted baffles 6 of Rookard into the reservoir of Schillig at a position corresponding to "the substance outlet passage opening out at one end thereof on either side of said first partition," as recited in claim 1. (Fact 110). Appellant pointed out that, for the Examiner to establish that this combination reasonably corresponds to this recited feature, baffles 6 of Rookard would have to be located over support 17 of Schillig, more specifically, dispensing pin 4 of Schillig. (Fact 111). The Examiner has not, and cannot, establish that one of ordinary skill in the art would have found it obvious to place baffles 6 of Rookard in canister 3 of Schillig over support 17 of Schillig, or more specifically, dispensing pin 4 of Schillig. (Fact 112).

The Examiner failed to respond to Appellant's argument that, in the alleged combination, one of ordinary skill in the art would place baffle 6 of Rookard in the center of reservoir 3 of Schillig, and not over the dispensing pin 4 of Schillig. The Examiner's Answer, at page 14, asserts that baffles 6 of Rookard are located in the center of modified reservoir 3 of Schillig and positioned with the substance outlet passage opening out at one end thereof on either side of the first partition.<sup>1</sup> (Fact 113). In the alleged modification, the Examiner's Answer asserts, at page 14, that it is within the purview of one of ordinary skill in the art to modify the baffles of Rookard to (1) have a cutout for support 17 of Schillig or (2) be disposed over support 17 of Schillig. (Fact 114). This assertion is without merit for at least the following reasons.

The configuration of Rookard is different than that of Schillig such that the alleged modifications are based on impermissible hindsight. Rookard has baffles 6 with openings 7 in a specific configuration to create separated volumes to prevent uncontrolled sloshing that would adversely affect a wearer of a canteen, and to allow liquid to be drained through the mouth 4 at a rate suitable for drinking. (Fact 115). In Rookard, mouth 4 is located at the center

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<sup>1</sup> The Examiner's Answer, on page 14, newly asserts that the substance outlet passage can correspond, as an alternative construction, to the top of reservoir 3 of Schillig. However, such a correspondence would render the spray device nonfunctional as a spray device because the substance outlet passage would not correspond to the path of the substance from the "reservoir" to the "spray mechanism."

of the top of the canteen, and baffles 6 are located in the center of the canteen bisecting mouth 4. (Fact 116). In addition, baffles 6 are disposed touching the edge of the canteen of Rookard until they reach mouth 4. (Fact 117). In contrast, Fig. 2 of Schillig depicts reservoir 3 without any baffle-like structures that has dispensing pin 4 where spray paint exits the reservoir and enters the spray device. (Facts 9 and 118). Fig. 2 of Schillig also depicts dispensing pin 4 being enclosed within support 17, which obstructs access to the dispensing pin 4, and being located near the side edge of reservoir 3. (Facts 12 and 119). For at least the following reasons, the Examiner impermissibly used the teachings of the present application to bridge the differences between Schillig and Rookard.

**a. Examiner's Modification of Rookard's Baffles to Accommodate Support in Schillig's Reservoir is Based on Impermissible Hindsight**

In the Examiner's first asserted scenario where the baffles 6 have a cutout over support 17, Rookard and Schillig, individually or in combination, fail to disclose or to have rendered obvious providing a cutout or otherwise shaping baffles around objects similar to support 17. (See, e.g., Fact 120). The Examiner asserts that one of ordinary skill in the art would have the skill to be able to make this cutout. (Fact 114). However, even if one of ordinary skill in the art has this level of skill, a point which Appellant does not concede, one of ordinary skill in the art would not have considered arranging the baffles over



the support to even need a cutout, as Rookard is silent about the need to position and design baffles around objects similar to support 17. In addition, such a baffle arrangement with a cutout would result in additional costs of designing, manufacturing, cleaning and recycling of paint canisters 3.

Without the hindsight knowledge gained from Appellant's specification, one of ordinary skill in the art would not have predictably modified the baffles to have a cutout to accommodate the different configurations of Schillig and Rookard with a reasonable expectation of success. The only way to reach these conclusions is to impermissibly use knowledge gained from Appellant's specification to reconstruct, in hindsight, Appellant's recited subject matter.

**b. Rookard's Baffles Disposed Over Schillig's  
Support Fail to Cure Alleged Sloshing Problem**

In the Examiner's second asserted scenario where baffles 6 of Rookard are disposed above support 17 of Schillig in reservoir 3 of Schillig, baffles 6 would not extend down to the bottom of reservoir 3. Therefore, in contrast to the way baffles 6 extend from the center until they touch the edge of the canteen to create separated volumes in Rookard to reduce sloshing, in Schillig the inserted baffles 6 would have to have a large breach at the bottom of the reservoir, and thus fail to create separate volumes.

Therefore, the modified reservoir of Schillig would still have the alleged problem of sloshing because baffles 6 are ineffective at preventing the liquid from moving through the breach to the volumes on either side of baffles 6. As

such, this modification fails to solve the alleged problem, and therefore moots the alleged motivation for the combination of Schillig and Rookard.

**3.     Liquid Dispensing Does Not  
Reasonably Define the Field of Endeavor**

The Examiner's Answer newly asserts that both Rookard and Schillig are in the field of liquid dispensing, and are thus in the same field of endeavor. (Fact 121). However, the asserted field is so broad that it would include toilet bowl and car engine design. (Fact 122). One of ordinary skill in the art would not reasonably be considered to be knowledgeable about such a large swath of technology areas. One of ordinary skill in the art in the art of paint sprayers or cosmetic applicators would not reasonably be considered to be knowledgeable about or look to marine survival canteens for potential modifications to paint sprayers or cosmetic applicators.

Therefore, one of ordinary skill in the art would not have looked to modify Schillig with Rookard in the asserted manner.

**4.     A "Cosmetic or Care Product" is a  
Recited Part of the "Spray Device"**

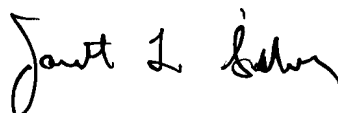
The Examiner's Answer newly asserts that "a cosmetic or a care product" is an intended use, and that little or no patentable weight is given to this feature. (Fact 124). Appellant disagrees. (Fact 125). In response to this new assertion of the Examiner, Appellant presents a new argument.

As recited in claim 1, the spray device comprises "a reservoir containing a substance ... wherein the substance comprises a cosmetic or a care product." (Fact 123). Here, the substance, "a cosmetic or a care product," is recited as a component of the claimed "spray device." (Fact 123). Therefore, a "cosmetic or a care product" is not merely an intended use. As such, patentable weight must be given to "a cosmetic or a care product," as recited in claim 1.

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For at least the reasons discussed above and in Appellant's Appeal Brief, it is respectfully submitted that the rejections are in error and that the pending claims are in condition for allowance. Appellant respectfully requests this Honorable Board to reverse the rejections of claims 1, 3-7, 9-17, 20-22, 25-34, 36-38 and 40-46.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jarrt L. Silver", is written over the printed name of William P. Berridge.

William P. Berridge  
Registration No. 30,024

Jarrett L. Silver  
Registration No. 60,239

WPB:JZS/hs

OLIFF & BERRIDGE, PLC  
P.O. Box 320850  
Alexandria, Virginia 22320-4850  
Telephone: (703) 836-6400  
Fax: (703) 836-2787  
Email: email@oliff.com

Filed: September 23, 2009